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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

Page

STATEMENT 1

SUMMARY OF ARGUMENT 4

ARGUMENT:

INTRODUCTION 6

I. DIVISION REPORTS AND RECOMMENDATIONS AND REGIONAL BOARD REPORTS ARE FINAL OPINIONS, INCLUDING CONCURRING AND DISSENTING OPINIONS, MADE IN THE ADJUDICATION OF CASES, WHICH MUST BE MADE AVAILABLE UNDER THE FREEDOM OF INFORMATION ACT 9

A. Background 9

B. Division reports and recommendations 12

C. Regional Board reports 15

1. Regional Boards are "agencies" within the meaning of the Administrative Procedure Act 15

2. Regional Board reports are "final opinions" under the Freedom of Information Act 16

a. Regional Board reports are final opinions of the Regional Boards 16

b. Regional Board reports are final opinions of the Board 19

II. THE BOARD'S FINAL OPINIONS ARE NOT EXEMPT FROM DISCLOSURE UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT 19

A. Background 19

Page

B. Division reports are not exempt from disclosure 26

C. Regional Board reports are not exempt from disclosure 28

CONCLUSION 31

APPENDIX 1A

CITATIONS

Cases:

American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D. C. Cir. 1969) 7, 17

Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970) 24

Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) 6, 20, 24

Irons v. Schuyler, 465 F.2d 608 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972) 7

Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958) 20

Lykes Bros. S.S. Co. v. United States, 198 Ct. Cl. 987 (1972) 30

Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974) 10, 11, 12

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) 24

Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971) 25, 26

Washington Research Project, Inc. v. Department of Health, Education and Welfare, No. 74-1027 (D.C. Cir. September 12, 1974) 15

Statutes:

Administrative Procedure Act:

5 U.S.C. § 551(1) 4, 16

Page

Freedom of Information Act:

5 U.S.C. § 552 2

5 U.S.C. § 552(a)(2)(A) 4, 8, 9, 14, 17

5 U.S.C. § 552(a)(3) 4, 7

5 U.S.C. § 552(b)(5) 4, 6, 8, 20, 29

Renegotiation Act of 1951, 50 U.S.C. App. §§ 1211, *et seq.* (1970) 2

50 U.S.C. App. § 1213(e) (1970) 10, 17, 21

50 U.S.C. App. § 1215(a) (1970) 2

50 U.S.C. App. § 1217(d) (1970) 15

50 U.S.C. App. § 1218 (1971) 30

Regulations:

17 Fed. Reg. 1401 (1952) 15, 1A-2A

39 Fed. Reg. 13650 (1974) 2

32 C.F.R. § 1460.2(c) (1968) 10

32 C.F.R. § 1471.2(b) (1968) 13

32 C.F.R. § 1472.3 (1968) 16

32 C.F.R. § 1473.2(a) (1968) 16, 17, 29

32 C.F.R. § 1475.3(a) (1968) 16

32 C.F.R. § 1477.2 (1968) 2

32 C.F.R. § 1477.4 (1968) 17

32 C.F.R. § 1480.5 (1968) 2

32 C.F.R. § 1498.6(a) (1968) 18, 22

32 C.F.R. § 1498.7 (1968) 22

32 C.F.R. § 1473.2(a) (1974) 29

32 C.F.R. § 1477.3 (1974) 3

32 C.F.R. § 1480.5(a)(3) (1974) 17

32 C.F.R. § 1480.5(a)(16) (1974) 17

32 C.F.R. § 1480.5(a)(18) (1974) 29

Legislative Materials:

S. Rep. No. 813, 89th Cong., 1st Sess. (1965) .. 7, 8, 14, 24

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) 8, 9, 10, 21, 24, 27, 29

Miscellaneous:

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) 7, 8, 20, 28

Page

K. Davis, *Administrative Law Treatise* (Supp. 1970) 7, 26, 31

Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047 (1973) 27

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BRIEF FOR THE RESPONDENT

STATEMENT

The renegotiation process has been described in detail in the brief of the Renegotiation Board (hereinafter referred to as the "Board"). As noted, the Board has substantially changed both its operating procedures and its policy on disclosure since this suit was instituted (Brief for Pet. at 3-4, n.4), but those changes

were prospective in nature and have had no effect on the public availability of the specific documents now in issue before this Court.

At the time this suit was brought in 1968, the Board did not make public its final opinions in any form despite the fact that it had promulgated new regulations pursuant to the requirements of the Freedom of Information Act (hereinafter cited as "FOIA"), 5 U.S.C. § 552, which specifically provided for the availability of "final opinions." 32 C.F.R. § 1480.5 (1968). It was only as a result of the first opinion of the court of appeals in this case that the Board was forced to recognize that, although not designated as an opinion, a "Statement of Facts and Reasons" issued pursuant to § 1215(a) of the Renegotiation Act of 1951, 50 U.S.C. App. § § 1211, *et seq.* (1970), and in accordance with the Board's regulations, 32 C.F.R. § 1477.2 (1968), constituted a final opinion which must be made available to the public under the FOIA, with appropriate deletion of identifying details (A.52-55).

Furthermore, contrary to the Board's brief (Brief for Pet. at 7-8), a "Summary of Facts and Reasons" was not made publicly available in 1968 when this suit was instituted. It was not until after this case was decided on remand by the district court that the Board amended its regulations to permit public inspection and copying of these Summaries.[1]

As noted in the Board's brief (Brief for Pet. at 13), as a result of the first appeal of this case, the court of appeals remanded the case to the district court to allow Grumman Aircraft Engineering Corporation (hereinafter

[1] 39 Fed. Reg. 13650 (1974).

referred to as "Grumman") access to final opinions and orders of the Board. However, on remand, the Board provided Grumman only with fifty-one clearance notices and two unilateral orders and thereupon filed a motion for summary judgment. The two unilateral orders contained determinations of excessive profits in the amounts of $8 million and $9 million, respectively, yet neither was accompanied by a final opinion.[2] Similarly, no final opinions were turned over by the Board in connection with the fifty-one clearance notices that were disclosed.[3]

Grumman thereupon filed a motion for an order in accordance with the mandate of the court of appeals (A. 70-72), describing with as much particularity as possible those documents which might be deemed to be the Board's final opinions in these cases. In order to establish which documents were in fact such final opinions, Grumman deposed Lawrence E. Hartwig, then the Board's Chairman. On deposition the Chairman described the contents of several representative case files developed during the renegotiation process.

Based upon the evidence presented, the district court held that "a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto"

[2] The Board did subsequently provide Grumman with a Summary of Facts and Reasons relating to one of these orders but only because the contractor had made the document public.

[3] Under its new regulations, 32 C.F.R. § 1477.3 (1974), the Board now issues an opinion in every adjudicated case. This is commendable and vitiates the suggestion made in the Board's brief that the issuance of such opinions would "seriously undermine the efficiency" of the Board. Brief for Pet. at 22-23.

(Pet. App. C, p. 40A). The court further held that, depending on the circumstances of the case, that document may be (1) a Summary of Facts and Reasons, (2) a report and recommendation of a Division of the Board[4], (3) a report of a Regional Board, or (4), as the court of appeals had previously held, a Statement of Facts and Reasons.

On appeal, the Board contested only categories (2) and (3). The court of appeals affirmed the findings and conclusions of the district court and also held that disclosure of Regional Board reports was supportable on two additional grounds, assuming, *arguendo*, that such reports are not final opinions of the Board (Pet. App. A, p. 3A). First, after holding that the Regional Boards are themselves "agencies" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(1), the court ruled that reports of the Regional Boards are final opinions of those agencies which must be disclosed to the public pursuant to 5 U.S.C. § 552(a)(2)(A). Secondly, the court said that Regional Board reports must be disclosed as "identifiable records" under 5 U.S.C. § 552(a)(3) since they are not exempt from disclosure under Exemption 5, 5 U.S.C. § 552(b)(5).

SUMMARY OF ARGUMENT

The FOIA requires that agencies make available for public inspection and copying their final opinions, including concurring and dissenting opinions, made in the adjudication of cases. 5 U.S.C. § 552(a)(2)(A).

[4] A Division consists of three of the five members of the Board (A. 80).

I.

The district court found and the court of appeals affirmed that Board documents which are designated as (1) Division reports and recommendations and (2) Regional Board reports constitute final opinions of the agency, depending on the circumstances of the case. If no Statement of Facts and Reasons or Summary of Facts and Reasons accompanies the agency's determination, the Division report and recommendation prepared by members of the Board is the final expression of the Board's reasons for the actions it takes in adjudicated cases. Similarly, in cases where the Regional Board issues a clearance notice to a contractor indicating that it has not realized excessive profits, the Regional Board report represents the final expression of the agency's reasons for the clearance determination.

The court of appeals alternatively held that Regional Boards are themselves agencies whose reports must be made public as final agency opinions. This holding is warranted under the Administrative Procedure Act and properly reflects the independent nature of the Regional Boards.

Division reports and recommendations and Regional Board reports are decisional documents which contain the Board's interpretations of its organic law. The withholding of these documents from the public would perpetuate the system of secret law that has developed within the Board.

II.

Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), prohibits disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." Division reports and recommendations and Regional Board reports contain a factual analysis of a contractor's performance under the statutory factors which the Board is required to apply. As such, they must be made available under the guidelines set forth in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973). These documents are not pre-decisional, consultative memoranda whose disclosure would inhibit future frank discussions among agency members. Rather, they are documents which are the product of the decision-making process and thus fall outside the scope of Exemption 5.

ARGUMENT

INTRODUCTION

The Board has taken the position that an appropriate judicial analysis of an FOIA request commences with an inquiry into the applicability of the Act's exemptions (Brief for Pet. at 20-21). The clearest expression of this approach to the Act is the Board's statement that, "If, as we have shown, the reports are covered by Exemption 5, the disclosure and other requirements of the FOI Act are expressly inapplicable, and whether the

reports are final agency opinions is irrelevant." Brief for Pet. at 34.[5]

This construction is completely contrary to the spirit of the FOIA and the intent of its framers which emphasized that the Act "is not a withholding statute but a disclosure statute . . ." S. Rep. No. 813, 89th Cong. 1st Sess. 5 (1965) (hereinafter cited as the "Senate Report"). In the foreword to his manual designed to assist agencies in implementing the FOIA, the Attorney General confirmed that the law was initiated by Congress and signed by the President with the concern "that disclosure be the general rule, not the exception . . ." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* iii (1967) (hereinafter cited as *Attorney General's Memorandum*).

We submit, therefore, that in order to prevent this new law from becoming a withholding statute as its predecessor had become (Senate Report at 3), a proper construction of the FOIA must commence with an inquiry into its affirmative disclosure provisions[6], with

[5] It should be noted that this constitutes a significant change from the Board's position in the court of appeals where in its brief it argued that, "The principal issue before the Court on this appeal involves the question as to what constitutes an 'opinion' of the Renegotiation Board within the meaning of the Freedom of Information Act, 5 U.S.C. 552(a)(2)(A)." Brief for Appellant at 21.

[6] The affirmative disclosure provisions of the FOIA are all enforceable under 5 U.S.C. § 552(a)(3). *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969); *Irons v. Schuyler*, 465 F.2d 608, 614 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972); K. Davis, *Administrative Law Treatise* 133-134 (Supp. 1970) (hereinafter cited as "Davis").

the exemptions operating only as possible exceptions to full disclosure.[7] This was clearly the intent of Congress:

> Subsection [(a)(2) of the FOIA] (as subsec. (b) of sec. 3 of the Administrative Procedure Act) deals with agency opinions, orders, and rules. This Administrative Procedure Act subsection is replaced by a detailed subsection, specifying what orders, opinions, and rules must be made available. The exceptions have again been moved to a single subsection, subsection [b], dealing with exceptions.

Senate Report at 6. *See also* H.R. Rep. No. 1497, 89th Cong. 2nd Sess. 7 (1966) (hereinafter cited as the "House Report").

A determination as to whether an exemption applies should thus be approached through a process where the policies underlying a specific disclosure provision are weighed against the policies underlying the exemption in issue. This was the approach employed by the court of appeals (Pet. App. A, pp. 12A-13A). It first concluded that Regional Board reports are final opinions of an agency subject to disclosure under 5 U.S.C. § 552(a)(2)(A). Thereupon it found, as a matter of definition, that such opinions, which are decisional documents, could not also be pre-decisional inter- or intra-agency memoranda exempt under 5 U.S.C. § 552(b)(5).

Accordingly, our brief first argues that the documents involved are final opinions which Congress mandated be made available to the public. We then

[7] It has been suggested that, in the public interest, agencies should consider disclosure even if an exemption applies. *Attorney General's Memorandum* at 2-3.

show that such opinions do not come within either the language or the policies underlying Exemption 5.

I.

DIVISION REPORTS AND RECOMMENDATIONS AND REGIONAL BOARD REPORTS ARE FINAL OPINIONS, INCLUDING CONCURRING AND DISSENTING OPINIONS, MADE IN THE ADJUDICATION OF CASES, WHICH MUST BE MADE AVAILABLE UNDER THE FREEDOM OF INFORMATION ACT.

A. Background

Under 5 U.S.C. § 552(a)(2)(A) each agency is required to make available for public inspection and copying final opinions, including concurring and dissenting opinions, made in the adjudication of cases. It is clear that the complexity of the administrative structure led Congress to order that these opinions be made available:

> As the Federal Government has extended its activities to solve the Nation's expanding problems–and particularly in the 20 years since the Administrative Procedure Act was established–the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection [(a)(2) of the FOIA].

House Report at 7. It is noteworthy that Congress singled

out the Board as an agency whose practices the FOIA was intended to correct:

> As the result of a Government Information Subcommittee investigation a number of years ago, two major regulatory agencies agreed to make public the dissenting opinions of their members, but a recent survey indicated that five agencies—including the Federal Deposit Insurance Corporation and the Renegotiation Board—do not make public the minority views of their members.

House Report at 8.[8]

The public's right to access to the opinions of the Board is particularly important because of the nature of the renegotiation process. The Board was recently described by this Court in *Renegotiation Board v. Bannercraft Clothing Co., Inc., Id.*, as having "unique operational methods." Chairman Hartwig himself described the procedure whereby determinations of excessive profits are made as informal (A. 100) and the Board's operation as "judgmental" (A. 180). Although Congress did not require the Board to determine excessive profits in accordance with any specific formula (A. 196), the Board is required to evaluate individual contractors under certain statutory factors set forth in the Renegotiation Act, 50 U.S.C. App. § 1213(e). It is this evaluation that gives meaning and substance to the Act as well as to the Board's regulations.

For instance, one section of the Board's Regulations, 32 C.F.R. § 1460.2(c)(1968), which amplify the statutory considerations, provides that:

[8] This portion of the legislative history was cited by this Court in *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 16 (1974), to support the conclusion that the Board is subject to the FOIA. It is even more in point, however, to the issue presently before the Court.

> In evaluating the contractor's performance, comparisons will be made with the prices, costs and profits of other contractors engaged in the production of the same or similar products or using the same or similar processes.

Public disclosure of the final opinions of the Board will permit anyone with an interest in the agency's proceedings to obtain from those opinions the factual information used by the Board to compare one contractor with another. It is clear from the Board's regulations that such comparative factual information constitutes one of the principal criteria used in determining the reasonableness of costs and profits, the efficiency of the contractor and the weight to be accorded the contractor under the other statutory factors enumerated in the Renegotiation Act.

Those factors establish only a vague framework within whch the agency operates. *See Renegotiation Board v. Bannercraft Clothing Co., Inc., Id.* at 28 (dissenting opinion). The Board, however, has developed certain governing principles under the statutory factors. As Chairman Hartwig testified, "Our people develop expertise through the years, and just know that in a certain industry or sub-industry, if a person has one-half of one percent profit on sales, that there is not excessive profit" (A. 88). By failing to publish the vast majority of its earlier opinions, in both excessive profits and clearance cases, the Board has continued to deny the public access to the reasons for its actions and thereby has perpetuated

a system of secret "expertise" which determines the outcome of many renegotiation cases.[9]

The essence of this case, therefore, is to shed some light on the "judgmental" standards which the Board uses to measure excessive profits by causing the Board to make known to the public how it has applied those standards in particular cases. Only by such knowledge will the public understand the meaning of those standards and have a basis for evaluating the Board's performance under its statutory mandate.[10]

B. Division Reports and Recommendations

To understand fully why a Division report and recommendation comes within the ambit of "final opinions," it is helpful to focus on precisely how such a document is formulated and what role it occupies in Board proceedings.

[9] In *Renegotiation Board v. Bannercraft Clothing Co., Inc., Id.* at 32-33, the dissenting opinion pointed out that, if the FOIA is to have any real meaning in the activities of the Renegotiation Board, that agency has no right to make secret the basis for its decisions. There appears to be nothing in the majority opinion that is inconsistent with this view.

[10] In *Renegotiation Board v. Bannercraft, Id.* at 16, this Court cited with approval the Second Circuit's description of the "ultimate purpose" of the FOIA as one "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope and procedure of federal governmental activities."

As described in the Board's brief (Brief for Pet. at 10), in a Class A renegotiation case[11], if the Board does not concur with a clearance determination by the Regional Board or if the contractor does not agree with a determination of excessive profits by the Regional Board, the case goes before a Division of the Board, consisting of three of the five Board members. In the representative case described by Chairman Hartwig on deposition, the contractor met with the Division, and thereafter one member of the Division wrote a report and recommendation which became the Division's majority report, and the third member of the Division wrote a dissenting report. The Division Chairman then presented the Division report and recommendation and the dissenting memorandum to the other two Board members. The Board approved the Division recommendation and determined that the contractor realized excessive profits (A. 165, 168-169). One member of the Board dissented. Finally, according to the Chairman's testimony, the Board issued a unilateral order unaccompanied by any opinion (A. 169).

There can be no doubt that the Division report constituted the last written expression of the reasons for the Board's determination in the case, for there was no evidence to indicate any modification of these views. We submit that the Division report reflects the "final opinion" of a majority of the members of the Board; at a minimum, the report and the dissenting memorandum represent the Board's concurring and dissenting opinions

[11] Class A cases are those where the contractor reports renegotiable profits of more than $800,000. 32 C.F.R. § 1471.2(b) (1968). The documents Grumman sought all involve Class A cases.

which must be made available under 5 U.S.C. § 552(a)(2)(A). *See* Senate Report at 7.

The district court found that such a Division report is "the crucial and final document" which "contains a consideration of the statutory factors, explains the reasons for the division's recommendation, and gives the facts on which that reasoning rests" (Pet. App. C, p. 37A). The district court concluded that this was the "essence of a final opinion." As the court stated (Pet. App. C, pp. 37A-38A):

> It is unrealistic to claim that because Board members might have different reasons for approval of the division's recommendation, the report of the division upon which its recommendation is based is not a final opinion. It is in fact the last document which explains reasons for the Board's decision. The report often reflects the views of a majority of the five Board members. But at the very least it reflects the analysis of one member and would thereby constitute a concurring opinion which under the Freedom of Information Act is included within the term final opinion. If Board members have differing rationale for approval of the division's recommendation, they may state it in concurring opinions or memoranda (footnote omitted).

This holding, which was affirmed by the court of appeals, is entirely correct.

C. Regional Board Reports

1. Regional Boards are "agencies" within the meaning of the Administrative Procedure Act.

In its opinion, the court of appeals has clearly set forth its reasons for holding that the Regional Boards are "agencies" within the meaning of the Administrative Procedure Act. In summary, that court pointed out that the Regional Boards enjoy substantial independent authority, which, at least in some cases, is not even reviewable; that the exercise of formal decision-making power by the Regional Boards was contemplated by Congress when it promulgated the Renegotiation Act of 1951; and that the Board's own regulations invest the Regional Boards with power normally exercised only by independent decision-making agencies.[11a] These reasons fully support the ruling below, and we refer the Court to the opinion of the court of appeals for the complete development of this point and the relevant citations (Pet. App. A, pp. 6A-12A).

One matter discussed in the opinion of the court of appeals which deserves elaboration is the court's reference (Pet. App. A, pp. 10A-11A) to the section of the Renegotiation Act of 1951, 50 U.S.C. App. §1217(d), which provides in pertinent part that, "The Board may delegate in whole or in part any function, power, or duty . . . to any agency of the Government, including any such agency established by the Board . . . ." Such delegation was in fact accomplished in 1952 when, by notice in the *Federal Register*, 17 Fed. Reg. 1401 (1952), the Board established the

[11a] *See also Washington Research Project, Inc. v. Department of Health, Education and Welfare*, pp. 11-17, No. 74-1027 (D.C. Cir. September 12, 1974), wherein the decision below is discussed.

Regional Boards and delegated to them certain "functions, powers and duties."[12]

The fact that the Board in this delegation has retained review authority in Class A but not in Class B cases does not alter the conclusion that the Regional Boards are agencies. The Administrative Procedure Act, 5 U.S.C. §551(1), defines an "agency" as each authority of the United States Government "whether or not it is within or subject to review by another agency . . . ."

2. Regional Board reports are "final opinions" under the Freedom of Information Act.

a. Regional Board reports are final opinions of the Regional Boards.

When a case has been assigned to a Regional Board, a renegotiator, who in some cases is a Regional Board member (A.178), and an accountant are selected to investigate the case (A.77). After extensive consideration, including various conferences, a possible inspection of the contractor's plant and a meeting between a panel of the Regional Board and the contractor, the Regional Board reaches a final conclusion. 32 C.F.R. §1472.3 (1968). In a Class A case, whether the Regional Board concludes that the contractor realized excessive profits or not, the Regional Board notifies the Board of the Regional Board's determination and submits a "report of the case" to the Board. 32 C.F.R. §§1473.2(a) and 1475.3(a) (1968). The contractor is also notified of the

[12]The notice is reprinted in full as the Appendix to this brief.

action taken by the Regional Board. 32 C.F.R. §1473.2(a) (1968).[13] It is this "report of the case" that Grumman contends is a final agency opinion issued in the adjudication of cases which must be made available pursuant to 5 U.S.C. §552(a)(2)(A).

During the course of his deposition, Chairman Hartwig described several such reports (A.95, A.110, A.137, A.145 and A.162). In each instance, the report contained an analysis under the statutory factors which the Board is required to apply pursuant to 50 U.S.C. App. §1213(e), including efficiency of the contractor, reasonableness of costs and profits, net worth, extent of risk assumed, contribution to the defense effort and character of business.[14] In detailed testimony concerning one representative file, it was revealed that the report had been signed by the Regional Board member who prepared it and also signed by the Chairman of the Regional Board on behalf of the Regional Board (A.118-119).[15]

[13]Since the basis for the Regional Board's determination is contained in its "report of the case", that document should be made available under the rationale of *American Mail Line, Ltd. v. Gulick, supra.*

[14]These are the same captions as are contained in a Summary of Facts and Reasons (A.149) and a Statement of Facts and Reasons (A.35-41) which the Board now makes publicly available. 32 C.F.R. §§1480.5(a)(3) and (16) (1974). *See also* 32 C.F.R. §1477.4 (1968).

[15]According to the Board, "If the regional board's recommendation is different from the staff or panel recommendation, an addendum to the staff report is prepared reflecting the action of the regional board" (Brief for Pet. at 7). In the absence of such an addendum, the report must be viewed as reflecting the views of the Regional Board.

Pursuant to the previously mentioned Delegation of Authority (see Appendix), the Regional Boards were delegated the power to determine excessive profits and, in Class A cases, to issue clearances and enter into refund agreements embodying determinations of excessive profits, if the Board has indicated it is "in accord" with such determination. As noted by the district court (Pet. App. C, pp. 38A-39A), if the Board is in accord, the notice of clearance is signed and issued by the Chairman of the Regional Board and states, in part:

> This determination has been made by this Regional Board pursuant to due delegation of authority and The Renegotiation Board has advised the Regional Board that it is in accord with this determination.

32 C.F.R. § 1498.6(a) (1968). The Notice further states that it:

> shall constitute the *final* action by the Government with respect to renegotiation pursuant to the Act for the fiscal year under review (emphasis supplied).

Based on the foregoing, the district court properly concluded (Pet. App. C, p. 39A):

> Such a report gives the facts and reasons for the Regional Board's recommendation and it is that recommendation which is approved by the Board. Here again a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report.

b. Regional Board reports are final opinions of the Board.

The district court found (Pet. App. C, p. 39A) and the court of appeals agreed (Pet. App. A, p. 3A) that, for purposes of the FOIA, Regional Board reports are final opinions of the Board itself when a clearance is issued by the Regional Board after the Board has indicated it is "in accord."[16] As the court of appeals noted (Pet. App. A, pp. 4A-5A, n.7), the Board has procedures available for reassigning a case to itself for in-depth consideration if it is not satisfied with the determination of the Regional Board (A.82). Where such a reassignment does not occur, the Regional Board report constitutes what Chairman Hartwig referred to in a different context as the "final exposition of the Board's view of the case" (A.67), thus making it the Board's final opinion.

II.

THE BOARD'S FINAL OPINIONS ARE NOT EXEMPT FROM DISCLOSURE UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT

A. Background

As has been discussed, *supra*, pp. 6-9, after an affirmative obligation to disclose under the FOIA has

[16]The question of whether Regional Board reports are final opinions of the Board need only be reached if the Court does not agree with the holding that Regional Boards are agencies which issue their own final opinions.

been demonstrated, disclosure must be made unless one of the FOIA's exemptions is held to apply to the category of documents in issue. In this case, the Board has argued that the exemption contained in 5 U.S.C. §552(b)(5) prohibits disclosure because (1) the documents are pre-decisional (Brief for Pet. at 24-27, 30-32), (2) disclosure would impair the efficiency of the Board (Brief for Pet. at 27) and (3) disclosure would mislead the public (Brief for Pet. at 28-29). These arguments must be tested against the policies supporting disclosure of final agency opinions, the purposes for the exemption and the realities of the renegotiation process.[17]

Exemption 5 deals with "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). Quoting from *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.), this Court, in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86 (1973), pointed out that "the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'" This Court went on to say (410 U.S. at 87):

[17]Since Congress singled out final opinions as one of the categories of information specifically required to be made available under the FOIA, the policy considerations favoring disclosure, which must be weighed against the policies underlying Exemption 5, are more compelling than they would be if the documents fell into the catch-all section of the FOIA providing for the disclosure of "identifiable records," which the Board willingly concedes these records do. Brief for Pet. at 21, n.20. *See generally Attorney General's Memorandum* at pp. 29-30.

> But the privilege that has been held to attach to intragovernment memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of non-disclosure protects." *Kaiser Aluminum & Chemical Corp., supra*, at 49, 157 F. Supp. at 946. Thus, in the absence of a claim that disclosure would jeopardize state secrets, see *United States v. Reynolds*, 345 U.S. 1 (1953), memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government (footnote omitted).

The Division reports and recommendations and Regional Board reports sought here are not advisory, nor are they consultative in nature. Rather, they reflect "the end product of Federal administration,"[18] which in this case is the determination of the existence or nonexistence of excessive profits. In making this determination, the Board is required to measure a contractor's performance against generally stated but specific criteria enumerated in 50 U.S.C. App. §1213(e). In practice, this means that, after a case has been assigned to a Regional Board, the renegotiator prepares a report which, according to Chairman Hartwig's deposition, has the following format (A.110):[19]

[18]House Report at 7.

[19]*See also* the descriptions of Regional Board reports at A.95, A.137, A.145 and A.162, of Division Reports at A.149 and A.165-166 and of a Summary of Facts and Reasons at A.149.

1. Application of Statutory Factors
   A. Character of Business
   B. Reasonableness of Costs and Profits
   C. Extent of Risk Assumed
   D. Capital Employed
   E. Contribution to Defense Effort
   F. Efficiency
   G. Special Matters[20]
2. Determination and Proposed ED Settlement

Focusing first on the section captioned "Determination and Proposed ED Settlement," it simply contained, in the case file about which Chairman Hartwig was testifying, the statement that "It is proposed that the regional board recommend to the Renegotiation Board that a clearance notice be issued" (A.111). This recommendation was thereupon approved by the Regional Board and signed on behalf of the Regional Board by its Chairman (A.119). The contractor was then notified that the Regional Board had recommended to the Board that a clearance be granted (A.112). After the Board unanimously approved the recommendation of clearance (A.121), a Notice of Clearance After Assignment was issued to the contractor (A.120).[21]

[20]The testimony indicates that Special Matters could include such items as claims by the contractor which are in litigation, claims against the contractor which are in litigation, general accounting reports which have been made public, questions relating to exemptions from renegotiation, references to Congressional investigating Committee reports involving the contractor or Internal Revenue adjustments that are still open (A.110-111).

[21]The forms of notice furnished by the Regional Board to the contractor explicitly state that the "determination" has been made by the Regional Board. 32 C.F.R. §§1498.6(a) and 1498.7 (1968).

The Board claims that the report of the Regional Board contained "recommendations of subordinate staff civil servants to their presidentially appointed superiors" (Brief for Pet. at 31). However, the only recommendation contained in the report is that the Regional Board recommends a clearance to the Board. Since this recommendation was openly communicated to the contractor, it cannot serve as the basis on which the Board invokes Exemption 5.

The remainder of the Regional Board report consists of a section entitled "Application of Statutory Factors." Because of the nature of this case, Grumman has never had access to the documents in issue; nor were they available for *in camera* inspection by the district court.[22] Nonetheless, there is in the record a document which contains the Board's evaluation of a contractor's performance under the statutory factors. That document, the Statement of Facts and Reasons issued to Grumman for its fiscal year 1965 (A.35-41), demonstrates that an analysis under the statutory factors is factual in nature with the exception of a one sentence conclusion concerning the weight the contractor is to be accorded under each such factor.

Neither the application of facts to enumerated statutory factors nor the conclusions derived therefrom would appear to constitute the type of "advice from staff assistants," "exchange of ideas among agency personnel" or "frank discussion of legal or policy

[22]*See* the discussion between counsel appearing at A.105-106 and A.115-118.

matters" which Congress sought to protect by Exemption 5. House Report at 10; Senate Report at 9. Rather, this is factual material which this Court has recognized should not be shielded by Exemption 5:

> It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Environmental Protection Agency v. Mink, *Id.* at 91. *See also Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971). This approach is consistent with Congress' intent "to delimit the exception [Exemption 5] as narrowly as consistent with efficient Government operation." Senate Report at 9. To deny disclosure here would "authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum." *Bristol-Myers Company v. FTC*, 424 F.2d 935, 939 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

Facts and reasons forming the basis for an agency's decision should be revealed if the FOIA is to have any force in enabling the public to deal effectively with government agencies. As has been stated:

> [P]rivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.

Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708 (D.C. Cir. 1971).

By revealing the outcome of the cases it adjudicates without providing the public with the facts which it considers pertinent to the various statutory factors, the Board is developing a secret body of case law. Professor Davis pointed out in his analysis of the FOIA that:

> The *Attorney General's Memorandum* does not seem to take account of such possible facts as that the "opinions and interpretations" may constitute the working law of the agency, that the agency's employees may be instructed to apply such law in all individual cases, that the agency may be systematically withholding such law from affected parties, and that therefore the effect of non-disclosure may be to protect an outrageous system of secret law. Nor does the *Attorney General's Memorandum* refer at this point to the clear congressional intent that "interpretations" and "administrative staff manuals and instructions" must be disclosed, as subsection [(a)(2)] specifically requires. The problem, unrecognized by the *Memorandum*, is the accommodation of the purpose behind the requirements of subsection [(a)(2)] to the purpose behind the fifth exemption. I think such an accommodation calls for disclosure of all "opinions and interpretations" which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process

> of working out its policy and determining what its law shall be. The need for secret communication among officials within the government should be recognized, but so should the need for prohibiting all secret law.

Davis at 159. In the case of the Board, a balancing of the factors favoring disclosure against the policies underlying Exemption 5 clearly militates in favor of disclosure of the Board's opinions.

B. Division Reports Are Not Exempt from Disclosure

In its brief, the Board has characterized Division reports both as pre-decisional communications and as "a part, albeit an integral part, of the decision-making process" (Brief for Pet. at 24, 29). It is this duality which caused the court of appeals to comment on "the difficulty of line-drawing between documents that reflect only pre-decisional deliberation and those which reflect decisions communicated to the public" (Pet. App. A, p. 21A). The fact remains that Division reports are prepared by members of the Board as a part of the decision-making process and thus reflect the views of the author in his or her decision-making capacity.[23] As

[23] This is to be contrasted with the situation in *Sterling Drug, Inc. v. FTC, supra*, where the memoranda of individual Commissioners comparing two mergers "were not likely to reflect fully the reasons either of the decision-makers voted to allow the previous merger." Pet. App. A, p. 19A, n.29.

such, the documents should not be viewed as intra-agency communications which Exemption 5 would protect from disclosure.

The Board has also argued that under the decision of the court of appeals a member of the Board responsible for preparing a Division report "can no longer write solely for his fellows, but must be sensitive that he may also be explaining a subsequent decision to the public at large" (Brief for Pet. at 27). As the court of appeals pointed out, however, "If agency custom were the touchstone for applicability of the exemption, the pro-disclosure policy of the Act would be easily evaded" (Pet. App. A, p. 14A).

Agency members who are charged with enforcing the law should be prepared not only to make decisions for which they may be criticized, but also to explain those decisions to the public. This is preferable to having decisions made in secret without explanation, resulting in the public being denied the right "to find out how [its] Government is operating" (House Report at 6). It has been suggested that "The inquiry with regard to every requested memorandum must be into the acuteness of the public's need for disclosure thereof as an agency rule or rule of decision, as against the likelihood that any resulting criticism will be concentrated on the authors of particular recommendations." Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047, 1063 (1973). In the case of the Board, it is clear that the public's need to understand the manner in which the statutory factors are applied in decided cases deserves preeminence over the sensibilities of individual Board members.

In arguing that disclosure of Division reports would mislead the public, the Board refers to the "common understandings and experiences" and "shared perceptions" of its members (Brief for Pet. at 28). Continued withholding of these Division reports from the public would only serve to widen the gulf between the public's perception and the realities of the renegotiation process. This is the evil which the FOIA sought to correct, because, as the Attorney General recognized, the public has a need for "the statement of principles and standards, and the rationale and explanation of agency policy, set forth in agency decisions which determine private rights and obligations." *Attorney General's Memorandum* at 18. The Board, in failing to recognize this, is depriving the public of a full awareness of the manner in which the Board is implementing its statutory responsibilities.

C. Regional Board Reports are not Exempt from Disclosure

The Board's arguments concerning the applicability of Exemption 5 to Regional Board reports are no more compelling than they are to Division reports. As discussed, *supra*, at pp. 15-16, Congress contemplated that the Board would delegate certain functions, powers and duties to agencies which the Board has the power to create.

At the time this action was commenced, the Board's regulations provided, as follows:

> When a Regional Board *determines* in a Class A case that the contractor has not realized excessive profits for the fiscal year under review, the Regional Board will notify the Board of the Regional Board's *determination* and submit a report of the case to the Board. The Regional Board will notify the contractor of the action taken by the Regional Board (emphasis supplied).

32 C.F.R. §1473.2(a) (1968).[24] It is clear from the regulations that the "report of the case" is forwarded to the Board in support of the Regional Board's "determination." Since the contractor is advised of the determination, it is no longer an intra-agency matter. Nor should the report which is prepared to justify that determination be so considered since it represents the completion of "the process of . . . issuing [a] . . . decision" by the Regional Board in its capacity as an agency. House Report at 10.

A further argument for the nonapplicability of Exemption 5 to Regional Board reports is that such a report has been made "available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b) (5). In a recent renegotiation case which was

[24] This is to be contrasted with the comparable regulation presently in effect:

> When a Regional Board *finds* in a Class A case that the contractor has not realized excessive profits for the fiscal year under review, the Regional Board will make and enter a *recommendation* of clearance and submit the case to the Board. The Regional Board will notify the contractor of the action taken by registered mail and, at the same time, will furnish the contractor with a Regional Board opinion pursuant to §1477.3 of this chapter (emphasis supplied).

32 C.F.R. §1473.2(a) (1974). Such Regional Board Opinions are available to the public pursuant to 32 C.F.R. §1480.5(a) (18) (1974).

before the Court of Claims for redetermination[25] the contractor made a motion for production of several documents including "The 'Report of Renegotiation' or 'Clearance Notice Report' of approximately six pages prepared by R. M. Jack, R. M. Masucio or others and approved by the Eastern Regional Renegotiation Board on or about June 23, 1969 . . ." *Lykes Bros. S.S. Co. v. United States*, Ct. Cl. No. 594-71 (Motion filed March 2, 1972).

The trial commissioner denied the contractor's motion, the contractor sought review by the Court of Claims, and the Court of Claims ordered the trial commissioner, to the extent that any formal claims of privilege were raised by the defendant, to consider the documents *in camera* "for the purpose of excluding or excising from the documents intra-agency advisory opinions or recommendations, trade secrets, or commercial or financial information obtained from persons outside the Government under an express or implied agreement that such information or trade secrets will be kept confidential." *Lykes Bros. S.S. Co. v. United States*, 198 Ct. Cl. 987, 988 (1972). The trial commissioner's subsequent order, filed on June 22, 1972, makes it clear that no claim of privilege was raised concerning "The 'Report of Renegotiation' or 'Clearance Notice Report' " and that the document was in fact delivered to the contractor.

[25] By amendment to the Renegotiation Act, jurisdiction for the redetermination of excessive profits was transferred from the U.S. Tax Court to the Court of Claims. 50 U.S.C. App. §1218 (1971).

Since it is evident from the language of Exemption 5 that it is not applicable to documents available in litigation with the agency, the Board cannot invoke that exemption in an effort to withhold Regional Board reports from the public.

CONCLUSION

As Professor Davis has so aptly stated, "One fundamental principle is that secret law is an abomination." Davis at 137. This case seeks to cause the Board to make available to the public its final opinions in adjudicated cases so that the principles and factors which govern the renegotiation process will become generally available and will no longer be hidden in the files of the Board.

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 1974

APPENDIX

The Renegotiation Board's creation of and delegation of authority to Regional Boards, contained in 17 Fed. Reg. 1401 (1952), is as follows:

Regional Boards

Delegation of Authority With Respect to Certain Functions, Powers and Duties

Pursuant to section 107 (d) and (f) of the Renegotiation Act of 1951:

1. There are hereby created four Regional Boards which shall consist of five members each, and which are hereby designated as the Washington Regional Board, the New York Regional Board, the Chicago Regional Board, and the Los Angeles Regional Board, respectively.

2. For the purpose of this delegation:

(a) The term "Board" means The Renegotiation Board.

(b) The term "Regional Board" means a Regional Board created by the Board by section 1 of this delegation.

3. The Board hereby delegates to each Regional Board the following functions, powers, and duties:

(a) To conduct renegotiation under the Renegotiation Act of 1948 and the Renegotiation Act of 1951 with the contractor or subcontractor in any case which is assigned by the Board to such Regional Board.

(b) To make a determination of excessive profits with respect to any such contractor or subcontractor.

(c) To issue clearances and enter into refund agreements embodying determinations of excessive profits made by such Regional Board in cases designated by the Board as Class A cases, *Provided*, That the Board in each case has advised the Regional Board that the Board is in accord with such determination.

(d) Subject to such review as may be prescribed by the Board by regulations or otherwise, to issue clearances, enter into refund agreements, or issue unilateral orders embodying determinations of excessive profits made by such Regional Board in cases designated by the Board as Class B cases.

4. No function, power or duty herein delegated shall be redelegated.

5. This delegation is subject to revocation or modification in whole or in part at any time.

Dated: February 8, 1952.

JOHN T. KOEHLER,
Chairman,
The Renegotiation Board.